



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 28, 2011

Mr. Stephen E. Dubner
Law Offices of Stephen D. Dubner
For Venus Independent School District
3000 South Stemmons Freeway
Lake Dallas, Texas 75065

OR2011-04219

Dear Mr. Dubner:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 412648.

The Venus Independent School District (the "district"), which you represent, received a request for (1) the cellular telephone records of a named district employee for a specified time period and (2) all costs related to the cleanup of a specified property. You indicate that information concerning the second item will be provided to the requestor. You claim the information related to the first item is not public information that is subject to the Act. In the alternative, you claim the information related to the first item is excepted from disclosure under section 552.117 of the Government Code. We have considered your arguments.

The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). The characterization of information as "public information" under the Act is not dependent on whether the requested records are in the possession of an official or employee of a governmental body or whether a governmental body has a particular policy or procedure that establishes a governmental body's access to the information. *See* Open Records Decision No. 635 at 3-4 (1995) (finding that information does not fall outside definition of "public

information" in Act merely because individual official or employee of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Thus, the mere fact that a governmental body does not possess the information at issue does not take the information outside the scope of the Act. *See id.* In Open Records Decision No. 635, this office found that information in a public official's personal appointment calendar may be subject to the Act in certain instances. *See* ORD 635 at 6-8 (stating information maintained on a privately-owned medium and actually used in connection with the transaction of official business would be subject to the Act). We note that the Act's definition of "public information" does not require that a public employee or official create the information at the direction of the governmental body. *See* Gov't Code § 552.002. Accordingly, the mere fact that a public employee generates business-related information using personal resources does not take the information outside the scope of the Act.

You state the district provides the named employee with a monthly stipend for the use of a personal cellular telephone for work-related business and that the cellular telephone is listed in the employee's personal name. You assert the bills for the cellular service are sent to the employee's home, they are paid from the employee's personal checking account, and the district does not require the employee to provide the cellular records to the district in order to receive the stipend. We reiterate that information is within the scope of the Act if it relates to the official business of a governmental body and is maintained by a public official or employee of the governmental body. *See id.* § 552.002(a). Thus, to the extent the requested cellular telephone records are maintained by the named employee and relate to the official business of the district, they are subject to the Act, and we will address your arguments against disclosure for this information. However, to the extent the requested cellular telephone records do not relate to the official business of the district, they are not subject to the Act and need not be released.

Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body that receives a request for information it wishes to withhold pursuant to the Act is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The district received the request for information on January 4, 2011. However, as of the date of this letter, the district has not submitted a copy or representative sample of the requested

information. Accordingly, we find the district failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See* Gov't Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Your claim under section 552.117 of the Government Code can provide a compelling reason for non-disclosure.¹ Section 552.117 encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). However, as previously noted, you inform our office that the district provides the named employee with a monthly stipend for the use of a personal cellular telephone for work-related business. Because you have not submitted the requested information to this office for our review, we have no basis for finding it confidential. Thus, we have no choice but to order you to release the responsive information in accordance with section 552.302 of the Government Code. If you believe the information is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

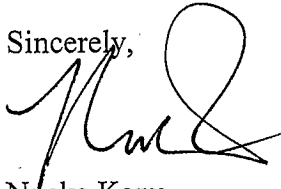
In summary, to the extent the requested personal cellular telephone records do not relate to the official business of the city, they are not subject to the Act and need not be released. However, to the extent the personal cellular telephone records relate to the official business of the city, they are subject to the Act, and as you have failed to comply with section 552.301(e) of the Government Code, they must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

¹Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1).

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nneka Kanu', with a large loop at the end.

Nneka Kanu
Assistant Attorney General
Open Records Division

NK/tf

Ref: ID# 412648

Enc. Submitted documents

c: Requestor
(w/o enclosures)